STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 23, 2013
v	No. 308494 Berrien Circuit Court
JERMAINE ALLEN OSBY, Defendant-Appellant.	LC No. 2011-003819-FH

Before: MURPHY, C.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to 120 to 360 months in prison. For the reasons set forth below, we affirm.

I. FACTS

In the early morning hours of July 21, 2011, defendant snuck into the backyard of Victor Harper's home in Benton Township. Defendant approached a window at the back of the house, used his hands to break the glass, and climbed into the bedroom. The noise woke Harper and he "rushed" defendant. Harper tried to punch defendant, but missed. Harper then tripped and fell onto the bed. He put his knees up to protect himself, but defendant managed to hit Harper in the jaw. Defendant ran out of the house through a door while Harper grabbed his rifle, followed defendant, and fired. Police recovered defendant's fingerprints from broken glass outside the home, and Harper identified defendant at the preliminary examination as the person who broke into the house. Defendant testified that a dog chased him onto Harper's property. Defendant admitted he broke a window with his hands, but claimed it was an accident and he denied ever entering the house. Though Harper testified at the preliminary examination, he was not present at defendant's trial because it was originally scheduled for a later date, he was working out of town, and when he learned about the new trial date it was too late for him to return to Michigan. Rather than delay the trial, defense counsel agreed that the prosecutor could present Harper's transcribed preliminary examination testimony.

II. DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE

Defendant claims the prosecutor presented insufficient evidence to support his home invasion conviction. To determine the sufficiency of evidence, we consider "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. . . . . The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). To establish first-degree home invasion, the prosecutor had to show that (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. See *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004); MCL 750.110a(2). The first and third elements were established by Harper's testimony that defendant entered his house without permission when Harper was at home. For the second element, the prosecutor presented alternative theories: (1) that defendant intended to commit a larceny in the house or (2) that he committed an assault while entering, being present in, or exiting the house.

Relying on *People v Young*, 89 Mich App 753, 763; 282 NW2d 211 (1979), defendant claims the prosecutor's use of circumstantial evidence requires that an inference of criminal intent must be shown with "impelling certainty." However, the case law defendant cites has been disavowed. See *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). "Intent to commit larceny cannot be presumed solely from proof of the breaking and entering." *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). There must be at least "some circumstance reasonably leading to the conclusion that larceny was intended." *People v Palmer*, 42 Mich App 549, 552; 202 NW2d 536 (1972). "However, intent may reasonably be inferred from the nature, time and place of [a] defendant's acts before and during the breaking and entering." *Uhl*, 169 Mich App at 220. Here, the evidence showed that defendant had some familiarity with Harper and the house, and broke into the home from the rear window in the very early morning. Defendant acted furtively and in the dark, when it was unlikely people would be up and about in the area or in the house. Further, defendant was familiar with the exterior of the home, the resident, and the neighborhood. This all provides sufficient evidence to support an inference that defendant broke into the home with the intent to commit a larceny. *Id*.

Harper also testified that defendant struck him in the face after Harper fell onto the bed and pulled his knees up in an attempt to shield himself. This constitutes evidence of a completed battery and, therefore, there was evidence of an assault. See *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004) (quotations and citations omitted) ("it is impossible to commit a battery without first committing an attempted-battery assault."). While defendant asserts that insufficient evidence supported his conviction because Harper was not credible, this claim is meritless. "We do not interfere with the jury's assessment of the weight and credibility of witnesses or the evidence . . . ." *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013).

B. JURY INSTRUCTIONS

Defendant asserts that the trial court should have read the jury a special unanimity instruction. "Because defendant failed to request a special unanimity instruction, or challenge

the trial court's failure to give such an instruction, this issue is unpreserved," and our "review is limited to plain error affecting defendant's substantial rights." *People v Waclawski*, 286 Mich App 634, 678-679; 780 NW2d 321 (2009) (citation omitted). A defendant is not entitled to relief under this test "unless he can establish (1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012) (citations omitted). "When a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory." *People v Asevedo*, 217 Mich App 393, 397; 551 NW2d 478 (1996), citing *People v Johnson*, 187 Mich App 621, 629-630; 468 NW2d 307 (1991).

Here, defendant was charged with a single count of first-degree home invasion. Because intent to commit larceny and the commission of an assault constitute alternative means of proving a single home invasion offense, and would not support convictions of separate and distinct home invasion offenses, a special unanimity instruction was not necessary. See *Id*.; *People v Gadomski*, 232 Mich App 24, 29-31; 592 NW2d 75 (1998).

Defendant claims the trial court should have given the jury a definition for "assault." This claim is unpreserved and we review it for plain error. *Waclawski*, 286 Mich App at 678-679. "The court must inform the jury of the law by which its verdict must be controlled," such that "failure to instruct regarding *any* of the elements of" the offense at issue is error. *People v Duncan*, 462 Mich 47, 52-53; 610 NW2d 551 (2000) (footnote omitted). However, "[w]ith some but not all elements missing, the jury still may be able to fulfill its intended function." *Id*. at 54. "If the evidence related to the missing element was overwhelming and uncontested, it cannot be said that the error affected the defendant's substantial rights or otherwise undermined the outcome of the proceedings." *People v Kowalski*, 489 Mich 488, 506; 803 NW2d 200 (2011). Moreover, "[e]ven if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002), citing *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Here, defendant took the position at trial that he was never inside Harper's home. The evidence established that not only did defendant enter Harper's home, he hit Harper in the jaw while Harper was trying to shield himself. While the trial court did not give the jury a definition of "assault," the instructions fairly presented the issues, the evidence clearly established this element even using a layman's understanding of the word, and defendant has not shown that the omission of a specific instruction on this matter impaired his substantial rights. Accordingly, he is not entitled to relief on this issue.

C. JAIL TIME CREDIT

Defendant argues that the trial court should have awarded him credit for the time he spent in jail before sentencing pursuant to MCL 769.11b. However, credit for time served does not apply under circumstances like this, where defendant committed the offense while on parole. Defendant had to serve the remainder of the sentence for which he was paroled, and was not entitled to jail credit for this conviction. *People v Idziak*, 484 Mich 549; 773 NW2d 616 (2009); *People v Jackson*, 291 Mich App 644, 649-650; 805 NW2d 463 (2011). Defendant claims that *Idziak* was wrongly decided, but only the Supreme Court can modify or overturn its precedent

and we are bound by the Supreme Court's decisions until it does so. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 387-388; 741 NW2d 61 (2007) (citation omitted). Moreover, defendant's claim that parolee defendants who choose to exercise their right to a jury trial are improperly "punished" for doing so, was also effectively resolved in *Idziak*. See *Idziak*, 484 Mich at 572, quoting *Corbitt v New Jersey*, 439 US 212, 218-219; 99 S Ct 492; 58 L Ed2d 466 (1978).

D. EVIDENTIARY HEARING

Defendant argues that the trial court erroneously denied his motion for an evidentiary hearing and for investigative funds to establish his ineffective assistance of counsel claim. "[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The purpose of a *Ginther* hearing is to allow a defendant to establish such facts or produce evidence to assist in making his claims. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973). "A trial judge need not in every instance hold an evidentiary hearing when presented with a motion for a new trial and supporting affidavits. An evidentiary hearing is not required where the critical facts are not in dispute." *People v Michael Anthony Williams*, 391 Mich 832, 832 (1974). An appellant may also move this Court to remand to the trial court for an evidentiary hearing pursuant to MCR 7.211(C)(1)(a), which requires an appellant to "identify an issue sought to be reviewed" and demonstrate that "development of a factual record is required for appellate consideration of the issue." A motion under MCR 7.211(C)(1)(a) "must be supported by affidavit or offer of proof regarding the facts to be established at a hearing."

Here, defendant asserts that he told his attorney that he wanted Harper to testify in person, he claims that counsel should have called two or more witnesses who would testify that defendant was at a party earlier on the evening of the offense, and that defense counsel did not talk to him about the facts of the case until two days before trial. Defendant presented no affidavit or offer of proof in support of his claims. Therefore, defendant has not established a factual dispute entitling him to a *Ginther* hearing or demonstrating ineffective assistance of counsel. *Id.*; *Hoag*, 460 Mich at 6; MCR 7.211(C)(1)(a). Likewise, defendant's failure to provide any offer of proof as to his allegations is fatal to his request for investigative funds. The trial court has discretion to determine whether an indigent defendant has demonstrated that an investigator is necessary, but a defendant's reasons cannot rest on "pure conjecture." *People v Johnson*, 245 Mich App 243, 260; 631 NW2d 1 (2001). Defendant's claim is "pure conjecture," and the trial court correctly denied his request. See *id.*

E. CONDUCT OF THE PROSECUTOR

Defendant maintains that the prosecutor committed several acts of misconduct. Defendant failed to object to any of the statements he now challenges and, therefore, these claims are unpreserved. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010); *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). A defendant pressing an unpreserved claim of prosecutorial misconduct "must show a plain error that affected substantial rights, and the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Parker*, 288 Mich App 500, 509; 795 NW2d 596 (2010). "Prosecutors are typically

afforded great latitude regarding their arguments and conduct at trial. They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). Claims of prosecutorial misconduct are reviewed case by case, with the prosecutor's remarks evaluated in the context of the entire record. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007).

Defendant argues that the prosecutor committed misconduct by introducing evidence that defendant's fingerprints were in the "Automated Fingerprint Identification System" (AFIS), which compares the details of a submitted fingerprint of unknown identity against a database of fingerprints with known identities. Defendant asserts this evidence was improper because it suggested to the jury that defendant had a criminal record. Defendant's claim is meritless; a "defendant's right to be presumed innocent until proved guilty is not infringed where the state maintains his fingerprint and arrest cards in a criminal identification system. Fingerprints are a matter of identification, not incrimination." *People v Cooper*, 220 Mich App 368, 375; 559 NW2d 90 (1996).

Defendant asserts that by telling the jurors they could "speculate" about defendant's intent to commit a larceny, the prosecutor misstated the law. It is improper for a jury to speculate about "what the prosecuting attorney might be required to prove," where there is a total failure of the trial court to properly instruct them in the law to be applied. See *People v Lambert*, 395 Mich 296, 304; 235 NW2d 338 (1975); *Duncan*, 462 Mich at 52-53. However, that is not the issue here. Rather, defendant's argument appears to hinge on the distinction between "inference" and "speculation." "Speculation or mere conjecture 'is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference.'" *Shaw v City of Ecorse*, 283 Mich App 1, 15; 770 NW2d 31 (2009), quoting *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). Factual inferences must have support in the record and cannot be arrived at by mere speculation. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). Reasonable inferences may be drawn from factual evidence to determine intent. See *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008) ("[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice."). Here, because evidence established defendant's intent to commit a larceny, it was not misconduct for the prosecutor to argue that the jury could make such an inference. *Bahoda*, 448 Mich at 282 (quotation omitted) (Prosecutors "are free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.").

Defendant claims the prosecutor also improperly injected his personal belief that defendant committed an assault. This claim is also meritless. "Where the prosecutor's argument is based upon the evidence and does not suggest that the jury decide the case on the authority of the prosecutor's office**,** [even] the [use of the] words 'I believe' or 'I want you to convict' are not improper." *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988) (citation omitted); see also *Unger*, 278 Mich App at 240 ("prosecutorial arguments regarding credibility are not improper when based on the evidence, even if couched in terms of belief or disbelief."). Here, evidence clearly supported a finding that defendant committed an assault and the prosecutor did not use words such as "I believe;" thus, the prosecutor's statements were not improper. *Id*.

F. ASSISTANCE OF COUNSEL

Defendant contends he received ineffective assistance of counsel. Whether a person has been denied the effective assistance of counsel is a mixed question of fact and law. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010) (citation omitted); *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and counsel's performance must be measured against an objective standard of reasonableness without the benefit of hindsight. *People v Payne*, 285 Mich App 181, 188, 190; 774 NW2d 714 (2009).

Defendant claims that defense counsel did not meet with him to discuss the case until two days before trial. However, defendant does not support this contention with an affidavit or offer of proof, and evidence of these assertions is not apparent in the record. This is fatal to his claim. See *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008) ("Defendant argues . . . defense counsel failed to spend adequate time meeting with him. He also claims that defense counsel failed to personally interview defense witnesses before trial. However, these claimed deficiencies are not apparent from the record and, thus, are not subject to our review.").

Defendant also makes a more general allegation that defense counsel was ineffective because of his failure to investigate potential witnesses attending a party defendant now claims he attended, and others in the neighborhood who may have heard the gunshot or a dog barking that night. "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *Payne*, 285 Mich App at 190, quoting *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004). However, "[i]t must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Additionally, "counsel cannot be found ineffective for failing to pursue information that his client neglected to tell him." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Again, defendant has not provided an affidavit or offer of proof setting out that he actually told defense counsel there was a party, witnesses who could verify defendant's presence at said party existed, or that he had been chased by a dog. Accordingly, defendant's claim fails as a matter of law. See *McGhee*, 268 Mich App at 626; *Hoag*, 460 Mich at 6; *Odom*, 276 Mich App at 417.

Defendant argues that defense counsel improperly attempted to waive defendant's right to confrontation by permitting Harper's preliminary examination testimony to be read into the record, and was ineffective for failing to adequately cross-examine Harper and impeach his testimony. "[I]f the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record." *People v Buie*, 491 Mich 294, 315; 817 NW2d 33 (2012). Defendant did not object on the record in this case. "We will not second-guess counsel on matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight." *Horn*, 279 Mich App at 39. "A difference of opinion regarding trial tactics does not amount to ineffective assistance of counsel." *People v Stubli*, 163 Mich App 376, 381; 413 NW2d 804 (1987); *People v Nickson*, 120 Mich App 681, 685; 327 NW2d 333 (1982). "This Court will not substitute its judgment for that of

trial counsel regarding matters of trial strategy, even if that strategy backfired." *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

Defendant argues that he gained nothing by the stipulation permitting the use of Harper's preliminary examination testimony, but Harper's absence as a live witness may have diminished the effect of his testimony. Defendant's argument amounts to a disagreement over trial strategy, and we will not second-guess the strategy. Defendant has not shown that defense counsel provided ineffective assistance by waiving Harper's live testimony. See *Buie*, 491 Mich at 315; *Stubli*, 163 Mich App at 381.

Defendant also claims that defense counsel's limited cross-examination at the preliminary examination and failure to directly impeach Harper's testimony amounted to ineffective assistance of counsel. Again, however, "[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy . . . . We will not second-guess counsel on matters of trial strategy . . . ." *Horn*, 279 Mich App at 39 (citations omitted). Failure to impeach a witness on all contradictory aspects of his statements is not definitive evidence of ineffective assistance of counsel. See *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987) ("[W]e do not find that failure to impeach [a witness] on all contradictory aspects of his preliminary examination and trial testimony was a serious mistake . . . . Rather, [counsel's] decision not to delve into all the differences constituted a matter of trial strategy . . . ."). Defendant has not shown that defense counsel's failure to cross-examine Harper in the manner he wishes, "deprived defendant of a substantial defense." *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989).

Finally, because we find no error, we reject defendant's claim that the cumulative effect of errors entitles him to a new trial. "Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *Dobek*, 274 Mich App at 106 (citation omitted).

Affirmed.

/s/ William B. Murphy
/s/ Henry William Saad
/s/ Deborah A. Servitto